EDITOR'S NOTE

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

H. K. PORTER CO., INC., Petitioner

v.

METROPOLITAN DADE COUNTY, FLORIDA, and JOHN A. DYER, individually and as contracting officer for Metropolitan Dade County, Florida, Respondent.

Appendix

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For the foregoing reasons, Silien's conviction is

AFFIRMED.

H.K. PORTER COMPANY, INC., Plaintiff-Appellant,

v.

METROPOLITAN DADE COUNTY, John Dyer, individually and as Contracting Officer for Metropolitan Dade County, Defendants-Appellees.

No. 86-5448.

United States Court of Appeals, Eleventh Circuit.

Aug. 24, 1987.

Lowest bidder brought action against county to challenge affirmative action program requiring 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system. The United States District Court for the Southern District of Florida, No. 81-2766-CIV-EBD, Edward B. Davis, J., awarded summary judgment to county. Lowest bidder appealed. The Court of Appeals held that: (1) statutes, which prohibit discrimination in programs or activities receiving federal financial assistance, permitted Urban Mass Transit Administration of Department of Transportation to impose affirmative action, minority business enterprise requirement, and (2) affirmative action program did not violate equal protection.

Affirmed.

1. Civil Rights ⇐9.5

Statutes, which prohibit discrimination in programs or activities receiving federal financial assistance, permitted Urban Mass Transit Administration of Department of Transportation to impose affirmative action, minority business enterprise requirement on contract for electrified third rail of metropolitan transit system. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689; Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1).

2. Constitutional Law ⇐219.1

Affirmative action program, that required 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system, was justified by Congress' compelling interest in eradicating continuing effects of past discrimination, was narrowly tailored to achieve stated goal of fostering minority participation, and did not violate equal protection, where program ended when construction was completed, and where bidding procedure excused bidder from contracting or subcontracting with minority business enterprises, if bidder demonstrated reasonable effort to contact and negotiate with minority businesses. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689; Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1); U.S.C.A. Const. Amend. 14.

3. Constitutional Law ⇐219.1

County, that used affirmative action program requiring 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system, was not required by equal protection clause to make findings in addition to Congress' legislative findings establishing that minorities did not participate in government contracts. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689; Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1); U.S.C.A. Const.Amend. 14.

Guy W. Harrison, Mershon, Sawyer, Johnston, Dunwody & Cole, Charles C. Kline, Miami, Fla., for plaintiff-appellant.

Robert S. Ginsburg, Dade Co. Atty., R.A. Cuevas, Jr., Asst. Co. Atty., Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The dispute in this case arises out of the award of a federal construction contract for the electrified third rail of Miami's metropolitan transit system. Appellee, Metropolitan Dade County ("MDC") awarded the contract to the second lowest bidder, Transit Products, Inc. based upon an affirmative action plan. The low bidder, H.K. Porter, Inc., appellant, alleged that the affirmative action plan was unconstitutional. The district court awarded summary judgment to MDC. Finding no error, we affirm.

The facts and procedural history are set out in detail in this court's opinion, *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 650 F.2d 778, 779–81 (5th Cir. 1981).[1] For the purposes of the immediate controversy, however, we here set forth a brief synopsis of the relevant facts.

On November 6, 1978, Congress passed the Surface Transportation Assistance Act of 1978 ("STAA"), Pub.L. No. 95–599, 92 Stat. 2689 (1978), which appropriated sums of federal money for the construction of highways and mass transportation systems. In the STAA legislative history, the House report of the Committee on Public Works and Transportation acknowledged a departmental initiative on behalf of the Department of Transportation ("DOT") to encourage the participation of minority business enterprises in the DOT's programs. H.R.Rep. No. 95–1485, 95th Cong., 2d Sess., *reprinted in* 1978 U.S.Code Cong. & Admin.News 6575, 6647. To facilitate this initiative, grantees of STAA funds were required to establish written affirmative action plans which included percentage goals for minority business participation.

In 1979 MDC proposed to construct a rapid transit system for the metropolitan Miami area. Pursuant to the STAA, the Urban Mass Transit Administration ("UMTA") of the Department of Transportation ("DOT") would finance 80% of the costs of the project. MDC would contribute the remaining 20%. On December 30, 1977, DOT issued Circular 1165.1—a statement of DOT's policy and requirements for UMTA grant recipients. The circular stated that "It is UMTA policy that MBE's [minority business enterprises][2] shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds." The circular further stated that failure to follow UMTA policy could result in disqualification of grantee funds. Additionally, on March 6, 1978, DOT issued Order 4000.7A,[3]

1. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) this court adopted as precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

2. For the purposes of contract Y–621, a minority business enterprise was defined as:

> a business enterprise that is owned and controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background, or other similar cause. Such persons would include, but not be limited to, Blacks (not of Hispanic origin); Hispanics; Asians or Pacific-Islanders; American Indians or Alaskan Natives; and women, regardless of race or ethnicity.

3. Order 4000.7A stated in pertinent part:

> a. It is the policy of the Department of Transportation to encourage and increase the participation of businesses owned and controlled by minorities, including women, (MBEs) in contracts and projects funded by the Department. Economically and socially disadvantaged individuals, including minorities and women, have traditionally been underrepresented as owners and managers of businesses in this country. The executive and legislative branches of the federal government have long recognized the need to promote the development of businesses owned by the economically and socially disadvantaged to achieve the goal of equal opportunity. To overcome the traditional

which re-emphasized the enforcement of DOT's MBE program. Both the circular and the order encouraged all grant recipients to establish percentage goals for MBE participation.

On June 10, 1979, MDC advertised for bids [4] from prime contractors interested in the electrified third rail to be used in the construction of the transit system under contract Y-621. Pursuant to STAA's initiative, MDC's bid invitation included a minority contractor provision which required each bidder to either (a) involve MBE's in 5% of the contract work or (b) demonstrate that it has made every reasonable effort to contract and negotiate with minority contractors in an attempt to achieve the stated goal. The bid invitation also contained a provision which allowed the bidder to demonstrate that it was unable to involve minority business, notwithstanding their efforts to contact and negotiate, because minority contractors were either not qualified to do the work required of the contract or because minority contractors were unavailable. The contract's Minority Contractor Participation Provision required each bidder to list the minority contractors the bidder intended to use if awarded the contract.

MDC received three bids for contract Y-621. The two lowest bids were received from Transit Products, Inc., ("Transit") and H.K. Porter ("Porter"). The bid from

underrepresentation of these groups in the business community, the federal government has used its procurement authority and its financial assistance programs to state and local governments as vehicles to assist minority business enterprises. Executive Order 11625 directs the Department of Commerce to provide technical and financial assistance to promote MBEs. Executive Order 11625 further requires that federal executive agencies develop comprehensive plans and programs to encourage minority business enterprise.

b. The Department of Transportation is firmly committed to fulfilling its responsibilities under this Executive Order and to meet the goal of greater MBE participation in contracts and projects funded by the Department, although this may result in some increased cost to DOT. To this end, DOT is requiring each of its operating elements and all aid recipients and their contractors to make strong affirmative action efforts designed to set and meet goals for increasing MBE involvement. These efforts will encompass all aspects of the procurement of supplies, equipment, construction and services, including professional service contracts, concession contracts and bank deposits.

c. The Department recognizes that meaningful gains in the level of MBE participation can be achieved only with energetic enforcement of this order and the commitment of all DOT employees, grantees and contractors to the goals of equal opportunity.

4. Contract Y-621's bidding requirements and procedures required each bidder, as part of its bid submission, to submit:

a completed Schedule for Participation by Minority Contractor, listing those Qualified Minority Contractors with which the Bidder intends to contract for the performance of portions of the work under the Contract, specifying the agreed price to be paid to each such Minority Contractor for such work, identifying in detail the contract items or parts thereof to be performed by each such Minority Contractor, including a proposed timetable for the performance of each such contract item and providing other information as may be required by the Schedule. No work shall be included in the Schedule which the Bidder has reason to believe the listed Minority Contractor will subcontract, at any tier, to a non-Minority Contractor;

a completed and signed Letter of Intent for each Minority Contractor listed in the Schedule;

a completed and signed Minority Contractor Identification Statement of each Minority Contractor listed in the Schedule and for the Bidder if it is a Minority Contractor, but no Minority Contractor Identification Statement is required for any Minority Contractor named in the Minority Contractor List, and in the event the work listed on the Schedule is not sufficient to fulfill the stated goal, a statement by the Bidder of the reasons why it believes it is in compliance with this Provision and a list of the names, addresses and telephone numbers of the Minority Contractors contacted by the Bidder with respect to the performance of work under the Contract. The listing of a Minority Contractor by a Bidder on its Schedule shall constitute a representation by the Bidder that such Minority Contractor is Qualified and not Unavailable, and a commitment by the Bidder that if it is awarded the Contract it will enter into a subcontract with such Minority Contractor for the portion of the work and at the price set forth in its bid submission, subject to the terms of this Provision.

The bidding procedures further stated that "MDC shall not award a [c]ontract to any [b]id-

Transit was for $8,873,502 and the bid from Porter was for $8,076,506.80. However, Porter, rather than list the minority contractors it intended to use if awarded the contract, left the six pages in contract Y-621's Minority Contractor Participation Provision blank. Porter instead attached a letter stating that no minority firms produced the required materials and that Porter would therefore "follow the same plan and outlines that we have had approved on other transit programs." The bid submitted by Transit involved 5% minority contractor participation in compliance with contract Y-621's 5% MBE goal.[5] MDC decided, after extensive proceedings [6] both at the administrative level and in federal court, to accept the bid proposed by Transit, despite the fact that Porter's bid was lower since Porter's bid did not comply with the contract's MBE provisions. Porter was given a compliance hearing on November 28, 1979. At the compliance hearing Porter was asked by MDC's Compliance Officer, Dr. James Corbin, to explain why it had not complied with contract Y-621's bidding procedure of listing the minority contractors it had contacted in order to meet the 5% MBE goal. Porter responded by stating that it had made a recent investment in an in-house assembly plant in Chicago that totally assembled all the component parts of the electrified third rail. Porter stated that due to its in-house assembly plant, only four items from outside sources were necessary to produce the electrified rail.[7] Porter stated that no minority firms produced any of these four items. Porter testified that because of the nature of its in-house plant, it was "economically impracticable" to break down contract Y-621 in an attempt to subcontract to MBE's.

On December 10, 1979, MDC's Contracting Officer, John Dyer, opined to MDC's Board of County Commissioners that Porter's bid was not in compliance with the minority participation provisions of contract Y-621. On December 10, 1981, Porter brought the immediate action against MDC, and John Dyer, as the Contracting Officer. Porter's complaint alleged that MDC's 5% MBE goal was both unconstitutional on its face and as applied in violation of 42 U.S.C. §§ 1981, 1983, 2000d (1982) and 49 U.S.C. § 1615 (1982). Porter also contended that MDC and John Dyer acted in an arbitrary and capricious manner in denying contract Y-621 to Porter. Porter also alleged $1,510,544.00 in damages as a result of not being awarded the contract.

Both MDC and Porter filed cross-motions for summary judgment before the district court. The district court held a pretrial conference, allowing both parties to present their arguments. The district court ruled that MDC's bidding procedure for contract Y-621 was not unconstitutional and that MDC, in denying the contract to Porter did not act arbitrarily or capriciously. The district court granted summary judgment in favor of MDC and against Porter. Under Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Since we find that there is no genuine issue as to any material fact, we affirm.

DISCUSSION

This case presents three issues: (1) whether the MBE program promulgated by the UMTA and MDC was violative of 42 U.S.C. § 2000d and 49 U.S.C. § 1615 thereby making the program unconstitutional on its face; (2) whether MDC acted unconstitutionally by employing a 5% MBE partic-

der which it determines fails to comply with the applicable requirements of this [p]rovision."

5. One of the minority firms Transit originally included in its bid for contract Y-621 was questioned by Porter as not being a bona fide MBE. Transit thereafter substituted a legitimate MBE, as it was allowed to do under contract Y-621's bidding procedure.

6. *See H.K. Porter*, 650 F.2d 778 (5th Cir.1981).

7. The General Manager of Porter's in-house assembly plant in Chicago, Mr. Gerhard O. Mietz, stated that contract Y-621 required four basic components: (1) steel rail, (2) aluminum extrusions, (3) a bolt holding the steel rail and aluminum together, and (4) oxide-inhibiting paste to be applied to aluminum and steel.

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ipation provision in its bidding procedure for contract Y–621; and (3) whether MDC acted arbitrarily and capriciously in denying the award of contract Y–621 to Porter.

With respect to the facial unconstitutionality of MDC's MBE program, Porter argues that the UMTA did not have the authority to promulgate such a program because Congress has statutorily prohibited any and all UMTA-funded programs from employing affirmative action. 42 U.S.C. § 2000d (1982) provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Porter argues § 2000d, therefore, cannot be used to authorize the MBE program propounded by UMTA. 49 U.S.C. § 1615(a)(1) provides:

> (a)(1) No person in the United States shall on the grounds of race, color, creed, national origin, sex, or age be excluded from participation in, or denied the benefits of, or be subject to discrimination under any project, program, or activity funded in whole or in part through financial assistance under this chapter.

Accordingly, Porter argues, any use of racial, ethnic or sexual criteria in awarding contract Y–621 is facially violative of both 42 U.S.C. § 2000d and 49 U.S.C. § 1615. Although we agree with Porter that the use of racial, ethnic or sexual preferences as a basis to award government contracts appears to be contrary to the clear language of the statutes, we are constrained to follow the precedential mandates of the Supreme Court. The Supreme Court has recently stated, "[i]t is now well established that government bodies ... may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." *United States v. Paradise*, — U.S. —, —, 107 S.Ct. 1053, 1064, 94 L.Ed.2d 203 (1987). In *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the Court held that Congress, in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended 42 U.S.C. § 2000e et seq., left free both private unions and employers to voluntarily employ a collectively bargained plan that reserves for black employees 50% of the opening positions in an in-plant craft-training program until the percentage of black craftsmen in the plant is commensurate with the percentage of blacks in the local labor force. In *Weber*, the respondent argued that Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent's argument was based upon a literal interpretation of § 703(a) and (b) of Title VII. Those sections on their face make it unlawful to discriminate on the basis of race in the hiring and selection of apprentices for training programs. *Weber*, 443 U.S. at 201, 99 S.Ct. at 2726. In rejecting a literal interpretation of those statutes, the Court stated, "[i]t is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.'" *Id.*, (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)). The Court stated that the prohibition against discrimination contained in § 703(a) and (b) must be construed in light of the legislative history of the acts and the historical context in which the acts arose. *Id.*

In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Supreme Court upheld the facial constitutionality of a similar federally funded project, which included a similar MBE provision. In *Fullilove*, Congress had enacted the Public Works Employment Act of 1977, 42 U.S.C. §§ 6701–6736, which authorized $4 billion dollars for federal grants made by the Secretary of Commerce to state and local governmental entities for use in local public work projects. Section 103(f)(2) of the Act, the MBE provision, required at least 10% of any local works project to be set aside for minority business enterprises. In upholding the constitutionality of the MBE provision as a legitimate remedial congressional objective, the Court stated

that, "[t]he legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U.S. at 468, 100 S.Ct. at 2767.

[1] Therefore, we here analyze the prohibitions against discrimination contained in § 2000d and 49 U.S.C. § 1615(a)(1) in light of the legislative and historical context in which the acts arose. An examination of the legislative and historical background giving rise to the promulgation of § 2000d and § 1615(a)(1) clearly indicates that Congress was addressing the need to ensure that minority business firms would be provided with a fair opportunity to participate in federally-funded government contracts. Indeed, in § 1615(a)(2) of the Act, Congress delegated to the Secretary of Transportation the responsibility to take affirmative action to assure compliance with Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level.

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitution antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

Fullilove, 448 U.S. at 483–84, 100 S.Ct. at 2777. Thus we conclude that in this case the UMTA had the authority, pursuant to the clear and strong Congressional mandate, to promulgate the MBE program relative to contract Y-621.

Porter also argues, however, that the MBE provisions of contract Y-621 were unconstitutional as applied. Porter's argument is grounded solely in Porter's interpretation of this court's opinion in *South Florida Chapters of Associated Contractors of America v. Metropolitan Dade Co.*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984). Porter alleges that the MBE provisions of contract Y-621 were unconstitutionally applied because the authorities failed to follow the three "common concerns" enunciated in *South Florida*. *Id.*, at 851–52. Porter argues that *South Florida* provides "a clear and detailed blueprint" for evaluating all minority preference programs. We think Porter's reliance on *South Florida* is misplaced. *South Florida* involved the constitutionality of a county ordinance and resolution granting to black contractors preferential treatment in the county's bidding process. *South Florida*, 723 F.2d at 847–48. In *South Florida* the Dade County Commission, in response to the May 1980 disturbances in Liberty City, passed an ordinance which operated to waive altogether the formal contract bidding process and to grant to black contractors the exclusive right to bid on the construction projects of the county. The ordinance also contained a sub-contractor's provision requiring that fifty percent of the dollar value of any county contract be awarded to black sub-contractors. *Id.*, at 848–49. The ordinance was challenged both facially and as applied to the county construction project for the Earlington Heights Metro-rail Station.[8] *Id.* at 848.

In analyzing the constitutionality of the race-conscious legislation, this court, "[w]ithout adopting a formal 'test,'" *South Florida*, 723 F.2d at 852, articulated what it construed to be the three common concerns to the various views of the Supreme Court in *Regents of the Univ. of Califor-*

8. The Earlington Heights Metrorail Station is one of the metrorail stations located in Dade County.

sis v. Bakke,[9] 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), and *Fullilove*, 448 U.S. 448, 100 S.Ct. 2758: "(1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination." *South Florida*, 725 F.2d at 851-52. These common concerns were set forth merely as safeguards to be used by a reviewing court in analyzing *"[l]egislation* employing benign racial preferences." *Id.*, (emphasis supplied). We therefore reject Porter's contention that *South Florida* provides federal courts with a detailed set of mandatory guidelines with which to analyze the constitutionality of any and all MBE programs.

Moreover, the Supreme Court has set forth a two-prong test to be applied in situations wherein preferential classifications are based upon racial and ethnic distinctions. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, ——, 106 S.Ct. 1842, 1846, 90 L.Ed.2d 260 (1986). In *Wygant*, the Court was called upon to decide the constitutionality of whether a school board could, consistent with the Equal Protection Clause, extend preferential employment protection to certain employees solely because of their race or ethnic origin. *Wygant*, 106 S.Ct. at 1844. The Court stated the classifications operated "against whites and in favor of certain minorities, and therefore constitutes a classification based on race." *Id.* at 1846. The Court went on to state such classifications must be justified by a compelling government interest. *Id.* Secondly, the means chosen to effectuate this interest or purpose must be narrowly tailored to the achievement of that goal. *Id.* (citing *Fullilove*, 448 U.S. at 480, 100 S.Ct. at 2775).

In addition, the Court has recently set forth factors to be considered in analyzing the appropriateness of race-conscious remedies. *Paradise*, 107 S.Ct. at 1067. These factors include, "the necessity for the relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Id.* We will therefore analyze the constitutionality of contract Y-621's MBE provision under the test set forth in *Wygant* while also considering the factors articulated in *Paradise*.

[2] We have noted that MDC, in implementing the MBE provisions of contract Y-621, was acting pursuant to Congress' compelling interest in eradicating the continuing effects of past discrimination against minorities in the participation of government contracts. *See Fullilove*, 448 U.S. at 497, 100 S.Ct. at 2784 (Powell, J., concurring). Further, the Supreme Court has recently made it clear that "[t]he government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *Paradise*, 107 S.Ct. at 1065. Congress' determination to foster greater MBE participation in government contracts was due, in part, to the fact that other potential possible remedies had proven unsuccessful. *See Fullilove*, 448 U.S. at 511, 100 S.Ct. at 2791 (Powell, J., concurring).

As for the duration of the relief, there is nothing in the record to suggest that MDC's bidding procedure for contract Y-621, including the MBE provision, was anything more than a temporary remedy. It was simply an absolute condition MDC had to meet to receive federal funds through the UMTA in order to finance the construc-

9. *Regents of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) was the Supreme Court's first direct confrontation with affirmative action programs. Petitioner Bakke challenged an admission program of the University of California's Davis Medical School, whereby sixteen of one hundred spaces available for the entering class were set aside solely for minority applicants. The case produced no majority, however, five justices held the quota invalid.

tion of the metrorail system. This procedure, being temporary, was not a policy of MDC to maintain a racial or ethnic balance, but was rather intended by Congress to eliminate a manifest racial and ethnic imbalance. *See Weber*, 443 U.S. at 208, 99 S.Ct. at 2729. Indeed, this particular program ended when the construction for contract Y-621 was completed. MDC's bidding procedure for contract Y-621 also contained a waiver provision which operated to excuse the bidder from contracting or subcontracting with MBE's if the bidder demonstrated that it had made every reasonable effort to contact and negotiate with MBE's, but was unable to achieve the 5% goal despite such efforts due to the fact that minority contractors were not qualified or not available. *See Fullilove*, 448 U.S. at 487, 100 S.Ct. at 2779 (significant that an administrative scheme provides waiver mechanism under MBE program).

We next consider whether the 5% goal implemented by MDC in connection with contract Y-621 is sufficiently narrowly tailored to achieve the stated goal of fostering greater minority participation in government contracts. *See Paradise*, 107 S.Ct. at 1064-74; *Wygant*, 106 S.Ct. at 1846. In *Wygant*, the Supreme Court decided a case involving constitutional implications analogous to the constitutional questions presented in this case. *Id.* at 1844. As we noted earlier in *Wygant*, the Court was called upon to decide whether a school board could, consistent with the equal protection clause, extend preferential employment protection against layoffs to its employees solely because of their race or national origin. *Wygant*, 106 S.Ct. at 1844. In *Wygant*, community racial tensions prompted the Jackson Board of Education to include a layoff provision in the collective bargaining agreement between the Board of Education and the Jackson Education Association that operated to lay off tenured non-minority teachers while allowing minority teachers on probationary status to be retained. *Id.*, 106 S.Ct. at 1844-45. When layoffs became necessary the Board retained the tenured non-minority teachers, thus refusing to follow the layoff provision of the collective bargaining agreement. *Id.*, 106 S.Ct. at 1845. The Jackson Education Association, along with two minority teachers who had been discharged, alleged the Board's failure to adhere to the layoff provision violated the equal protection clause of the fourteenth amendment and Title VII of the Civil Rights Act of 1964. *Id.* On cross motions for summary judgment, the district court, *inter alia*, dismissed the claims holding "that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination." *Id.*, at 1846. The Court of Appeals for the Sixth Circuit affirmed. *Id.* The Supreme Court reversed holding that the layoff plan was not sufficiently narrowly tailored, *inter alia*, because the plan was not supported by finding of past discrimination. *Id.*, at 1846-52. The court pointed out that "some showing of prior discrimination by the governmental unit involved" must be demonstrated before allowing even a limited use of racial and ethnic classifications in order to remedy prior discrimination. *Id.* at 1847.

[3] Porter argues that since Congress delegated to MDC the actual implementation of contract Y-621's MBE provision, MDC was required to make detailed and specific findings concerning past discrimination. We disagree. As indicated, MDC in implementing the MBE provisions of contract Y-621, was relying on Congress' legislative findings which clearly established that minorities were not participating in government contracts. *See Fullilove*, 448 U.S. at 478, 100 S.Ct. at 2774. Indeed, Congress' findings led the STAA to require that minority percentage goals be established as an absolute condition precedent to the receipt of federal funds. We hold that under the circumstances of this case, MDC was not constitutionally required to make additional findings of past discrimination regarding the awarding of this contract. Congress was concerned about a national problem. Its findings provide adequate support for such local projects.

Porter argues, nevertheless, that the 5% MBE goal in contract Y-621 is not narrowly tailored and thus unconstitutional as ap-

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plied because the goal was not based upon a study or investigation of the availability of qualified MBE's to participate in contract Y-621. The record does not suggest that MDC conducted such detailed studies regarding past discrimination against MBE's in the awarding of construction contracts or investigations regarding the availability of MBE's qualified to participate in contract Y-621.[10] We must concede that we are troubled by MDC's decision to use the 5% figure without supporting or substantiating the figure with some sort of consideration of the 5% goal to the relevant labor market of MBE's available to participate in contract Y-621. *See Paradise*, 107 S.Ct. at 1071. We share the Supreme Court's concern with racial and ethnic factors when used as a basis for affirmative action programs. *See Wygant*, 106 S.Ct. at 1847. ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant*, 106 S.Ct. at 1846 (quoting *Fullilove*, 448 U.S. at 491, 100 S.Ct. at 2781). Opinion of Burger, C.J.). However, federal courts have upheld affirmative action programs utilizing figures much higher than the modest 5% figure MDC implemented in this case. As noted, the Supreme Court in *Fullilove*, approved the use of a 10% MBE goal as sufficiently narrowly tailored to be a constitutionally acceptable means of redressing the present effects of past discrimination. *Fullilove*, 448 U.S. 448, 100 S.Ct. 2758. In *Weber*, the Court held Title VII did not prohibit an affirmative action plan collectively bargained between the United Steelworkers of America and Kaiser Aluminum & Chemical Corporation which reserved for black employees 50% of the opening positions in a sought after training program. *Weber*, 443 U.S. at 208-09, 99 S.Ct. at 2729-30. The Court in *Paradise*, 107 S.Ct. at 1067-74, upheld a one-black-for-one-white race conscious promotional requirement within the Alabama Department of Public Safety imposed by the district court as being sufficiently narrowly tailored to remedy past discrimination. It is also significant that MDC's implementation of this affirmative action program does not unnecessarily trammel the interest of non-minority contractors or sub-contractors, and thus does not impose an unacceptable burden on innocent third parties. *See Paradise*, 107 S.Ct. at 1073; *Weber*, 443 U.S. at 208, 99 S.Ct. at 2729. All that was required by Porter was that Porter demonstrate that it had made every reasonable effort to meet the 5% MBE provision, or demonstrate that it was unable to do so despite such efforts because minority contractors were not qualified or were not available. Further, the record reflects that MDC's decision to deny the award of contract Y-621 to Porter was not based solely on Porter's failure to meet the 5% MBE goal. The decision was also based on Porter's failure to make any effort to attempt to locate and contract or sub-contract with MBE's. The district court, in granting summary judgment against Porter, noted that Porter did not contact a single MBE, other than its already existing suppliers. We agree with MDC and the district court's conclusion that Porter has not demonstrated that it made every reasonable effort to attempt to locate and contract or sub-contract with MBE's. The district court concluded that the MBE provision of contract Y-621 was not unconstitutional. After our own examination of the record, taking into consideration the particular facts of this case and the relevant case law, we hold that MDC's use of a 5% MBE goal in contract Y-621 is not unconstitutional.

Porter's last argument is that MDC acted arbitrarily and capriciously in denying the award of the contract to Porter. Having held that MDC's bidding procedure for contract Y-621 is constitutional, this argument is without merit.

AFFIRMED.

10. MDC in fact proffered studies allegedly supporting the determination of a 5% MBE goal for contract Y-621 at the district court, however, the district court did not allow the proffered studies into evidence. MDC has not cross-appealed this ruling. Thus, no such studies appear in the record for our consideration.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-2766-CIV-EBD

H.K. PORTER CO., INC,

Plaintiff,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, and JOHN A. DYER, individually and as contracting officer for Metropolitan Dade County, Florida,

Defendants.

_____/

OPINION OF THE COURT GRANTING DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT

FILED by MB D.C.
MAY 9 1986
ROBERT M. MARCH
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

THIS MATTER is before the Court on the parties' cross-motions for summary judgment. At a pretrial conference, the Court heard argument from counsel on the issues to be tried and made various evidentiary rulings. The parties stated that the case could be decided without a trial upon the pleadings, if the record in H.K. Porter Co., Inc. v. Metropolitan Dade County, Case No. 79-4875-CIV-KING, were incorporated in the record in this case and the parties were allowed to supplement the record. The Court agreed to incorporate the record in Judge King's case into this case and allowed the parties to supplement the record. The Court agreed that the case could be taken under advisement on the parties' cross-motions for summary judgment on the issue of liability, although genuine issues of material fact remained as to the amount of damages. Rule 56(c) of the Federal Rules of Civil Procedure states: "A summary judgment, interlocutory in

character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

For the reasons expressed in this opinion, the Court concludes that the Defendants are not liable for damages to the Plaintiff, Therefore, Defendants' motion for summary judgment is GRANTED, and Plaintiff's motion for summary judgment is DENIED. Defendant is awarded taxable costs of this litigation in accordance with 28 U.S.C. §1920 and Fed.R.Civ.P. 54(d), to be taxed by the Clerk of this Court. Each party shall bear its own attorney's fees pursuant to 42 U.S.C. §1988. The Clerk is directed to close this case.

I. PLAINTIFF'S CLAIM

Plaintiff contractor, H.K. PORTER CO., INC., alleges that the inclusion of a 5% minority business enterprise goal in a contract for Defendant DADE COUNTY's Metrorail System amounts to reverse racial discrimination against white-owned contractors in violation of civil rights laws and the Constitution, actionable under 42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §2000d, and 49 U.S.C. §1615 and within this Court's federal question jurisdiction, 28 U.S.C. §1331 and its jurisdiction under 28 U.S.C. §1343. Defendants' minority business enterprise goal is allegedly unconstitutional on its face and unconstitutional as applied to Plaintiff, H.K. PORTER. Further, Plaintiff contends that Defendant, JOHN A. DYER, contracting officer with Metropolitan Dade County, in refusing to waive the 5% minority business enterprise goal to award H.K. PORTER the Metrorail contract in question, acted in an arbitrary and capricious manner

in violation of Florida administrative law, actionable as a pendent claim within this Court's diversity of citizenship jurisdiction pursuant to 28 U.S.C. §1332. Defendants deny violating either the federal civil rights laws or Florida administrative law by their decision not to award Plaintiff the Metrorail contract.

Plaintiff seeks damages in the amount of $1,510,544.00, plus interest on the damages from 1979, in addition to costs and attorney's fees.

II. PROCEDURAL HISTORY

This protracted litigation over a contract for the electrified third rail in DADE COUNTY's Metrorail rapid transit system began in District Court for the Southern District of Florida in October, 1979. The first lawsuit was styled H.K. Porter Co., Inc. v. Metropolitan Dade County, Case No. 79-4875-CIV-KING. A December 28, 1979 ruling by Judge James W. Kehoe in that case was appealed to the former Fifth Circuit, which vacated Judge Kehoe's order on procedural grounds and remanded the case with instructions to dismiss the complaint for injunctive relief without prejudice. H.K. Porter Co., Inc. v. Metropolitan Dade County, 650 F.2d 778, 783 (5th Cir. Unit B 1981)(Johnson,J.). The Court of Appeals held that Judge Kehoe, in granting Defendant DADE COUNTY's motion to dissolve a temporary restraining order, improperly ruled against the Plaintiff on the merits of its constitutional claim instead of restricting its review to the temporary restraining order issues before it. Id. In accordance with the mandate of the former

Fifth Circuit, Judge King dismissed the complaint, which had solely sought injunctive relief, in Case No. 79-4875-CIV-KING on September 20, 1981. On December 10, 1981, Plaintiff, H.K. PORTER filed a new complaint regarding the same matters involved in the first lawsuit, but seeking money damages and adding JOHN A. DYER as a Defendant. In accordance with the ruling of the Court of Appeals, this Court has accorded no precedential effect to Judge Kehoe's order ruling against Plaintiff on the merits. See Id. ("the district court's order will be without precedential effect"). The Court has reviewed the file in the first lawsuit, received voluminous additional evidence, reviewed numerous memoranda submitted to the Court, and heard argument of counsel on the merits of Plaintiff's claim.

III. FACTS

The facts are well-presented in Judge Johnson's opinion for the former Fifth Circuit, H.K. Porter Co., Inc. v. Metropolitan Dade County, 650 F.2d 778, 779-781 (5th Cir. Unit B 1981).

"On June 10, 1979, appellee Metropolitan Dade County (MDC) advertised for bids on an electrified third rail of a proposed rapid transit system for the Miami metropolitan area scheduled for completion in 1984. The construction costs for the electrified rail entitled Contract Y-621 were estimated at $9.1 million; the Urban Mass Transit Administration (UMTA) of the Department of Transportation (DOT) was to finance 80% of these costs through a federal grant and MDC would contribute 20% of the costs. On August 8, 1979, three bids on Contract Y-621 were

received and Porter Co.'s $8,076,506.30 bid was the lowest; Transit Products, Inc., (Transit), which is not a party to this action, made the second lowest bid at $8,373,502.00.

"MDC's bid invitation included a Minority Contractor Participation provision (Addendum 3) which required each bidder to either (a) involve minority business enterprises (MBD's) at 5% of the contract work or (b) demonstrate that it has made every reasonable effort to contract and negotiate with minority business enterprises in an attempt to subcontract work to achieve the 5% goal.[1] Porter Co.'s bid included the Addendum 3 forms but the forms were blank; Transit's bid included two minority contractors (businesses owned or controlled by women) for $580,000 of the contract work. Transit protested Porter's bid for failing to comply with Addendum 3. MDC decided to reject all of the bids on Contract Y-621 but it failed to follow its own procedures in doing so.

"On October 17, 1979, Porter Co. filed this diversity action against MDC alleging its failure to offer Porter Co. the requisite administrative review to determine whether Porter Co.'s bid was in compliance with the MBE provision. The district court (Judge King) granted Porter Co. an ex parte TRO on October 18, 1979, to maintain the status quo until the court could entertain Porter Co.'s preliminary injunction motion.[2] The TRO was extended twice and was to expire on November 3, 1979; on November 2, 1979, the district court granted Porter Co.'s summary judgment motion and ordered MDC to reinstate all of the bids and to hold a hearing before a Contracting Officer as required by MDC's

regulations in order to evaluate the responsiveness of Porter Co.'s bid. During the interim, Porter Co. had amended its complaint to allege that MDC's rejection of all the bids was arbitrary and capricious and to request a mandatory injunction requiring MDC to award the contract to Porter Co.

"The compliance hearing was held on November 28, 1979, before Contracting Officer John Dyer; after hearing Porter Co.'s evidence, Dyer determined that Porter Co. had not complied with MBE's provision and indicated that he would recommend that Transit be awarded the contract.[3] UMTA concurred with Dyer's decision which assured the 80% federal participation. After learning that Dyer planned to make his recommendation to MDC on December 18, 1979, Porter Co. sought and received, on December 18, an emergency ex parte TRO which enjoined MDC from awarding the contract to another bidder for ten days. Porter Co. also moved for an order to show cause why MDC should not be held in contempt of the district court's summary judgment order. MDC responded by moving for an emergency hearing to dissolve the TRO because the delay in awarding Contract Y-621 was causing a significant increase in the contract's overall price.

"The district court (Judge Kehoe)[4] held a hearing on these motions on December 18 and 19 at which both parties were able to argue and present evidence. Porter Co. amended its show cause motion on December 20, 1979, to allege for the first time that the MBE requirements exceeded the government's statutory authority and violated the equal protection clause of the Constitution and Title VI of the Civil Rights Act of 1964.

Additionally, Porter Co. moved on December 21 for leave to file a supplemental complaint which sought to join the United States Secretary of Transportation as a party and included the allegations of the unconstitutionality of MDC's actions. On December 27, 1979, Porter Co. filed a second preliminary injunction motion to preserve the status quo once the TRO expired on December 28; alternatively, Porter Co. moved to extend the TRO to prevent MDC from awarding the contract to Transit.

"On December 28, 1979, the district court granted MDC's motion to dissolve the TRO and denied Porter Co.'s show cause motion and motion for leave to file a supplemental complaint. In its memorandum opinion, the district court (Judge Kehoe) indicated that it was determining the merits of the pending motions of both parties. Consequently, the district court reached the merits of Porter Co.'s allegations that the MBE goal was unconstitutional; the court found that the 5% goal was constitutional and that the goal as applied to Porter Co. did not exceed the bounds of fundamental fairness. Moreover, in denying Porter Co.'s motion to show cause why MDC was not in contempt, the district court reviewed the hearing held before Contracting Officer Dyer and found that the hearing complied with Judge King's order granting summary judgment for Porter Co. The district court denied Porter Co.'s motion to add the Secretary of Transportation as a party defendant without discussion. Porter Co.'s second preliminary injunction motion was not mentioned in the December 28, 1979 order but Porter Co. has not alleged any

error with respect to the district court's treatment of that motion.

"Porter Co. filed a notice of appeal from the district court's final judgment and memorandum order on December 28, 1979. The district court had indicated during the hearing held on December 28 that it would stay its order for ten days to allow Porter Co. to apply to this Court for an injunction pending appeal. On Janury 4, 1980, the Fifth Circuit granted Porter Co. an additional five-day stay of the district court's order to allow consideration of Porter Co.'s Emergency Motion for Injunction Pending Appeal; however, the five-day stay was subsequently vacated on Janury 9, 1980, when this Court denied Porter Co.'s emergency motion. Shortly thereafter MDC awarded Contract Y-621 to Transit."

At the hearing before this Court on the parties' cross-motions for summary judgment, the Court indicated that both sides felt that there was no real factual dispute on the issue of liability, although, of course, the parties disagreed on the legal significance of the uncontested facts See Transcript of Hearing, November 7, 1984 at 5 and 12. (Docket # 88) Counsel for the litigants agreed that the factual record was undisputed; however, Defendants' counsel sought to raise two additional matters to add to the evidence.

First, DADE COUNTY sought to withdraw two admissions it had made during discovery. The facts admitted were: "Prior to August 22, 1979, no representative or official of the County or of the United States Department of Transportation made an

investigation to deterine whether five percent MBE participation was a reasonably obtainable goal or quota in connection with Contract Y-621." (Paragraph 60 of H.K.PORTER"s First Request for Admissions); "The 5% participation requirement of Y-621 was not based upon a previous investigation or calculation made by MDC or UMTA." The Court refused to allow DADE COUNTY to withdraw the admissions made in 1982, agreeing with H.K. PORTER that the facts had been admitted and that there was no evidence to contradict the admissions.

Second, the County sought to introduce evidence regarding its enforcement of the minority business enterprise requirement in Contract Y-621 on the second lowest bidder, Transit Products, Inc. See Defendant's Composite Exhibit 3. See also Footnote 7 infra. Although it was undisputed that the County monitored the second-lowest bidder and substituted the original minority subcontractor, Intransco, with a genuine minority business enterprise, Tepcon, Inc., the Court felt that additional evidence and testimony regarding Tepcon, Inc., would not be relevant to the issue of liability in this case as DADE COUNTY's actions were taken after the award of the contract. The good faith actions of the County in taking corrective actions in monitoring the second lowest bidder, Transit Products, Inc.'s, minority subcontractor after the award of the contract to Transit Products, Inc., is not an issue in these proceedings. Accordingly, the Court took no further evidence on matters occurring after the award of the contract but limited itself to the events of 1979, the same matters which Judge King and Judge

Kehoe had considered in the first case, H.K. Porter v. Dade County, Case No. 79-4875-CIV-KING. Upon the motion of DADE COUNTY, the Court admitted the entire record in the first case into evidence in this case.

As an overview, the Court notes that not only have the facts remained the same as in the first case, the positions of the parties have remained remarkably consistent since 1979. H.K. PORTER has insisted that the 5% minority business enterprise provison in Contract Y-621 is unfair, unreasonable and not feasible because there were no minority subcontractors who could do the Metrorail work. Articulate in-house and local counsel have explained H.K.PORTER's reasons at every step of the proceedings. The federal agency, the Urban Mass Transportation Administration, Dade County's Contracting Officer, Dr. John Dyer, the Dade County Commission, which voted to award the contract to Transit Products, Inc., and Federal Judge James W. Kehoe, have all disagreed with H.K. PORTER's position.

It is undisputed that the sole reason H.K. PORTER failed to get the Metrorail contract was the 5% minority business provision with which UMTA, Dade County, and Judge Kehoe felt H.K. PORTER had failed to comply. DADE COUNTY has not argued that PORTER lacked the technical ability or finances to perform the contract. DADE COUNTY has stuck to its 5% minority business goal for contract Y-621, arguing that it was willing to pay more for a contractor who could meet the goal and arguing that minority business participation was part of what DADE COUNTY bargained for and paid for in Contract Y-621. The County's position has

remained consistent throughout these proceedings--the 5% goal was feasible and H.K. PORTER failed to comply with the contractual requirement without justification.

To summarize the events of 1979 which lead to this lawsuit, on June 12, 1979, DADE COUNTY, through its agent Kaiser Transit Group, sent advance notice and a contract specifications book to approximately 90 potential bidders for Contract Y-621 (Plaintiff's Composite Exhibit 1/Defendant's Composite Exhibit 1). The Contract Specifications Book, approximately 100 pages in length, sent to the bidders prominently contained notice that minority business participation would be required from any successful bidder. See Plaintiff's Exhibit 1, "Contract Specifications Book", at page IFB 6, G.P 27-28, Appendix B Section III, p. 1-5). On July 17, 1979, the minority business participation goal for Contract Y-621 was set at 15% (Defendant's Exhbit 1, Memorandum from James D. Corbin, Director of Equal Opportunity Division to William A. Skeen, Jr., Contracts Manager). On August 7, 1979, Addendum III was issued and sent to the bidders which set the minority percentage goal for Contract Y-621 at 5% of the price. (Plaintiff's Exhibit 1, Bid Form for bid to be opened August 22, 1979 and Defendant's Exhibit 1, Memorandum, Stan Burkot of Kaiser Transit Group to file dated August 13, 1979).

DADE COUNTY's engineer estimated the cost of Contract Y-621 at $9,207,800.00. When the bids were opened on August 22, 1979, the County received two excellent bids far below the engineer's cost estimate -- H.K. PORTER's bid at $8,076,506.30

(Plaintiff's Exhibit 2, H.K. PORTER's bid form) and Transit Products, Inc. bid at $8,373,502.00 (Plaintiff's Exhibit 3, Transit Products' bid form). The bids were below estimate and within 3-4% of one another. Insul 8 Corporation, the third bidder, bid $11,063,591.00 for Contract Y-621. Insul 8 was the only other bid received by the County for the contract. The County decided, after extensive proceedings before the compliance monitor and in federal court, to take Transit Products' bid because it contained minority business participation, while H.K. PORTER's bid did not contain minority business participation. Compare Plaintiff's Exhibit 2 at Appendix B, pp. 11-17 with Plaintiff's Exhibit 3 at Appendix B, pp. 11-17).

To summarize the position of the parties, H.K. PORTER has never retreated from its view as expressed in the letter attached to the August 22, 1979 bid for Contract Y-621 written by R.E. Lillard, Manager of Transit Programs for H.K. PORTER that no minority subcontractor could do the work required on the Metrorail third-rail contract. (H.K. PORTER left the six pages in Appendix B, "Minority Contractor Participation Provision" on the Bid Form blank, including Mr. Lillard's letter instead). The letter, in its entirety, reads:

> We, the H.K. Porter Company, Inc., as a Corporation do and will adhere to every government requirement as to all EEO regulations and further, we shall attempt to involve as many minority contractors and suppliers as practicable on this program.
>
> Due to the nature of the products as specified in this transit program with regards to the raw products that are required, i.e., steel rail, aluminum extrusions, lockbolts, etc., and the

nonexistance of any minority firms in the production of these materials we shall follow the same plan and outlines that we have had approval on other transit programs.

We will appreciate any recommendations that you may have to offer with regards to this program.

R.E. Lillard
Manager, Transit Programs
H.K. PORTER CO., INC.

Plaintiff's Exhibit 2, at Appendix "B" inserted between pages 11 and 12.

Defendant, DADE COUNTY, has consistently characterized the letter as a "vague policy statement" and not in compliance with the contract's 5% minority participation goal. See, e.g., Plaintiff's Exhibit 4, Compliance Hearing before Dr. James Corbin, August 29, 1979 at p. 40.

The key factual determination for this Court to make is whether H.K. PORTER has proved that it falls within the "escape provision" of the Metrorail contract contained in Addendum No. 2 to the Contract, "Minority Contractors Provision, III, C: "Determination of Compliance", at pp. 4-5. Addendum No. 3 (Plaintiff's Composite Exhibit 1). Although H.K. PORTER claims it was surprised and prejudiced when Addendum III, which included the 5% minority goal, was sent by DADE COUNTY on August 7, 1979, the Court finds that argument first, not credible, and second, not relevant.

Despite H.K. PORTER's complaint about receiving Addendum III, which allegedly contained "new MBE requirements" only "seven working days" before the deadline for submitting bids

on Contract Y-621, the Court finds PORTER must have been aware that federal mass transit projects were going to contain minority business requirements. The Urban Mass Transportation Administration issued Circular 1165.1, entitled "UMTA MBE Policy and Requirements" on December 30, 1977. (Plaintiff's Exhibit 8). As PORTER has noted, H.K. PORTER was one of the few firms in the new mass transit commuter rail industry in the United States. See, e.g. Plaintiff's Exhibit 9, Public Hearing, Testimony of Mr. Lillard, at 101-134. Certainly, it must have carefully followed the actions of the UMTA, which provided the bulk of the funds for the projects H.K. PORTER had in Washington, Atlanta, San Francisco, Boston, and Chicago, as well as in Miami. The 1977 Circular stated: "It is UMTA policy that MBE's shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds." Plaintiff's Exhibit 8, UMTA Circular 1165.1 at 2. Under the section entitled "basis for approval", the Circular said that the required MBE programs for federally-funded mass transit programs "shall include, at a minimum . . . ercentage goals for the dollar value of work to be awarded MBEs." Plaintiff's Exhibit 8 at 4, Number 5(a)(3). H.K. PORTER could reasonably have been surprised at the 5% goal in Contract Y-621 only in the sense that that 5% goal was not higher. PORTER should have known that a specific goal for minority participation, rather than the unspecified general "best efforts" requirement for MBE involvement, would be required for Contract Y-621 in light of the Urban Mass Transit Administration's 1977 policy statement.

DADE COUNTY's incentive for setting a percentage of the value of the work to be awarded to MBEs in Contract Y-621 is clear and also contained in Circular 1165.1 -- "Failure to carry out the approved minority business enterprise action program shall be a breach of this Contract and may result in the termination of this grant, and preclude the Public Body from receiving further financial assistance under the Urban Mass Transportation Act or such other remedy as the Government deems appropriate". Plaintiff's Exhibit 8, at pp. 6-7.

Second, H.K. PORTER's argument about the timing of its receipt of Addendum III is not relevant because PORTER's position has consistently been that no minority subcontractors existed. Therefore, no amount of additional time would have assisted H.K. PROTER under its view of the facts. Finally, H.K. PORTER did not request an extension of the bid deadline, unlike Transit Products.

Therefore, H.K. PORTER's case on its compliance with the contract, leaving aside the legality of UMTA and DADE COUNTY's 5% goal, rests on whether H.K. PORTER fell within the "escape provision" of the contract. If H.K. PORTER met the requirements for the escape provision, DADE COUNTY would be in violation of the law and its own rules for awarding the Metrorail contract to the second-lowest bidder, Transit Products. Even though the bids were extremely close, DADE COUNTY is required to award public contracts to the lowest qualified bidder.

The "escape provision" is contained in Addendum III, Appendix B "Minority Participation Provision", Part III "Bidding

Requirements and Procedures Prior to Contract Award", ¶ C "Determination of Compliance". (Plaintiff's Exhibit 1, Addendum No.3, pp. 4-5) It reads, in its entirety, as follows:

> C. Determination of Compliance - the total price for work to be performed by Minority Contractors as indicated in each Bidder's Schedule for Participation by Minority Contractors is required to be sufficient to fulfill the stated goal, unless the Bidder shall demonstrate to the satisfaction of MDC that:
>
> 1. it has made every reasonable effort to contact and negotiate with Minority Contractors in an attempt to subcontract work, including every reasonable effort to select the portions of the work proposed to be subcontracted, in order to achieve the stated goal;
>
> 2. it was unable, notwithstanding such efforts, to achieve the stated goal because Minority Contracors were not Qualified or were Unavailable; and
>
> 3. it included in its Schedule such proposed agreements as could be made with such efforts.
>
> MDC shall not award a Contract to any Bidder which it determines fails to comply with the applicable requirements of this Provision. Nothing herein shall relieve any Bidder or any Contractor performing any work under the Contract from any of the terms, conditions or requirements of the Contract or modify MDC's rights as reserved in the Contract Documents.

It is undisputed that H.K. PORTER did not include any proposed agreements in its bid form--the pages were left blank. See Plaintiff's Exhibit 2. It is undisputed that H.K. PORTER did not contact any minority contractors in an attempt to subcontract work for Contract Y-621. E.g., Plaintiff's Exhibit 9 at 54. Therefore, provisions ¶¶ C(1) and C(3) are not applicable to this

determination of liability for the Metrorail contract at issue in this case. The key provision is ¶ C(2) and H.K. PORTER's contention that it was unable to achieve the stated 5% goal because minority contractors were not qualified or were unavailable.

H.K. PORTER has consistently maintained that the contact rail contract for Metrorail had to be done in-house at H.K. PORTER's special facility in Chicago, with the only subcontracting-out possibility being the provision of raw materials, for which no minority sub-contractros existed. As Lawrence E. Moncrief, H.K. PORTER's Assistant Counsel stated at the very first of many hearings in this case, the Compliance Hearing before Mr. James Corbin on August 29, 1979:

> Again, because of the nature of the process of making these rails, we feel that the only sub-out possibilitty would be the supply materials because it is a fairly sophisticated process to make this kind of rail. The only thing we feel we could sub-out would be the supply material and it is our opinion that no minority is out there who could do the job. There are no minorities who can supply aluminium extrusions. No minority contractor that extrudes aluminium to the shape we need. We have to buy it from a proprietary, the item, from those who make it. That is about it.

Plaintiff's Exhibit 4, "Compliance Hearing for Contract Y-621 H.K. Porter Company, Inc.", at 45-46.

Mr. Gerhard O. Mietz, General Manager of H.K. PORTER's Chicago Works, where the Metrorail contract was to be performed, stated that Contract Y-621 called for four basic components: (1) steel rail, (2) two aluminium extrusions, (3) a bolt holding the

steel rail and aluminium together, and (4) oxide-inhibiting paste applied to the interface of aluminium and steel. Plaintiff's Exhbit 9, "Minority Business Enterprise Public Hearing, Re: H.K. Porter Company, Inc." November 28, 1979 at 11.

Mr. Richard E. Lillard, Manager of H.K.Porter's Transit Programs, Electrical Division, testified that he was experienced in various contact rail contracts in connection with the bidding process, procurement of supplies, and work decisions. Plaintiff's Exhibit 9, November 28, 1979 Hearing at p. 21. Mr. Lillard testified that no minority firms produced the four major components nor the minor components needed for H.K. PORTER's in-house assembly of the rail. Plaintiff's Exhibit 9 at 33-51.

At the Public Hearing, the following exchange took place between Dr. John Dyer, Contracting Officer and Mr. Donald K. Moe, Vice-President, General Manager, Electrical Division, H.K. PORTER COMPANY, INC.:

> Dr. Dyer: Prior to submitting your bid on Contract Y-621, did Porter affirmatively consider the possibilitty of contracting any or all of that remaining work to minorities or any other subcontractors, for that matter?
>
> Mr. Moe: Yes, we do and did.
>
> Dr. Dyer: What was your decision?
>
> Mr. Moe: It was negative, and I would like to tell you why that decision was negative.
>
> Dr. Dyer: Then why don't we let you go ahead and do that.

Mr. Moe: Dr. Dyer, in addition to the facilities that have been discussed and related to the appurtenances and so forth, the Porter Company has made a million dollar commitment to the future of the third-rail electrification, and, this is an important part of the cost for the product you and other people in this business of putting new systems in require by both your specifications and actual application need.

I have a layout diagram of a 17,000 square foot addition completed in February of 1979 to our H.K Porter facility at roughly 2500 West Fulton Street, in Chicago, Illinois, and I would like to use nine photographs in walking my way through the facility to explain the process and the processes and the facility's value to the products involved in the production process.

(Mr. Moe proceeded with photographic slides showing the new facility in Chicago). Plaintiff's Exhibit 9 at 54-55.

H.K. PORTER was able to comply with MBE requirements in Baltimore from its plant in Lynchburg, Virginia by hiring minority-owned trucking firms. For the Miami Metrorail project, Mr. Moe stated it was not commercially feasible to send the product to Miami from H.K. PORTER's plant in Chicago via truck; the transportation had to be done by rail. Plaintiff's Exhibit 9 at 63.

Plaintiff's counsel has persuasively and vigorously argued that, on the basis of the facts discussed above, H.K.

PORTER was not able to find qualified minority subcontractors because of its in-house assembly in Chicago. See Plaintiff's Exhibit 9 at 82-90 (Closing argument of Mr. Charles Kline before Dr. Dyer); Plaintiff's Exhibit 15 Hearing before Judge Kehoe December 19, 1979 at 27 (Argument by Mr. Kline that H.K. PORTER made a calculated risk and decided it would be cheaper to fabricate the entire product in-house except for a handful of raw materials); Plaintiff's Exhibit 16 Hearing before Judge Kehoe December 20, 1979 at 29 (Mr. Kline's argument that PORTER's high fixed-cost for the Chicago plant placed it at a disadvantage for subcontracting compared to a firm without a plant and overhead). Transcript of Hearing November 7, 1984 (Docket # 88) at 47-51 (Mr. Kline's argument that commercially impossible for PORTER to subcontract fabricator process and no qualified minorities available for transport or raw materials). Cf. Plaintiff's Exhibit 10 (high percentage of minorities in Plaintiff's Chicago plant).

IV. H.K. PORTER NOT IN COMPLIANCE WITH CONTRACT'S ESCAPE MECHANISM

On the mixed question of law and fact regarding H.K. PORTER's compliance with ¶ C(2) of the escape provision,[5] the Court concludes that PORTER made a calculated risk investing in its in-house facility which made it difficult for PORTER to sub-contract out part of the work for Contract Y-621. However, the Court does not find that PORTER's in-house facility made PORTER unable to achieve the state 5% goal because "minority contractors were not qualified or were unavailable." Rather, PORTER's business decisions made it commercially unfeasible for

PORTER to subcontract. Even accepting PORTER's contention that it could not subcontract even 5% to minorities, the Court does not believe DADE COUNTY was compelled to find PORTER in compliance simply becaue of PORTER's internal business structure. It is not this Court's function to rewrite Contract Y-621 and strike the MBE provision or to excuse PORTER from its effect because of PORTER's excellent record of minority employment at its plants and that the particular plant in Chicago employed 33 workers, all of whom were minorities. There is no general constitutionally-compelled property right to government contracts which would have required DADE COUNTY to accommodate the internal business structure of one of the bidders for a contract. Cf. Economic Development Corporation of Dade County v. Stierheim, ___ F.2d ___ (11th Cir. 1986) (decided February 20, 1986) (Contractor's contract with county to distribute federal funds not property interest within the meaning of XIV Amendment). This Court agrees with the determination that H.K. PORTER was not in compliance with the Minority Business Enterprise requirement made by six previous levels of review - the Compliance Monitor, the Contracting Officer, the Urban Mass Transportation Adminsitration's Atlanta regional office and UMTA's Washington office, the Dade County Commission, and United States District Judge Kehoe. See, e.g., Defendant's Exhibit 2 (letters from Mr. Williams and Mr. Richardson); Memorandum Order of Judge Kehoe (December 28, 1979).

Therefore, DADE COUNTY had the right to choose the $8.3 million bidder, Transit Products, Inc., over the $8.1 million

bidder H.K. PORTER. Transit Products designated in advance, as required, minority business enterprise subcontractors in its initial bid, unlike H.K. PORTER. See Plaintiff's Exhibit # 3 (Transit Products, Inc., bid form, at Appendix B, pp. 11-17). DADE COUNTY made it clear that MBEs listed on the bid form were only "proposed" or "initial" minority firms until investigated. See Plaintiff's Exhibit 5 at 8 (Compliance Hearing September 5, 1979 before Dr. Corbin). Dr. Corbin expressed considerable skepticism about the genuineness of Intransco as a minority enterprise at the compliance hearing on Contract Y-621 within two weeks of the opening of the bid. See Plaintiff's Exhibit 5, at p.9 (Compliance Hearing September 5, 1979). H.K. PORTER's tactic in this case has been to put Intransco on trial. The matter of Intransco is as irrelevant to these cross-motions for summary judgment on liability as the subsequent follow-through by DADE COUNTY in enforcing the MBE goal upon Transit Products. Instead, Transit Products, Inc.'s willingness to abide by the 5% goal, and its willingness to substitute Intransco with another firm to comply with the contract, is the matter which is truly relevant to Defendant's liability.

Transit Products steadfastly has maintained that they would comply with the MBE requirement, even if it meant that Intransco would be substituted with another firm. On September 5, 1979, at the Compliance Hearing before Dr. James Corbin, Director of Equal Employment Opportunity, the following exchange took place between Dr. Corbin on the one side and on the other

side Mr. Hugh M. Mize, Jr. and D.G. Thomson, respectively, President and Vice-President of Transit Products, Inc.

> Dr. Corbin: Are you prepared to make that substitution [if Intransco is found not to be a minority firm] after being instructed by us?
>
> Mr. Thomson: I think we might have some difficulty getting the technology, but I am convinced we can put it together.
>
> Dr. Corbin: So, your answer to whether or not you are prepared to make a substitution is . . .
>
> Mr. Mize: Yes. We prefer not to. We hope these people qualify.

Plaintiff's Exhibit 5 at 8.

On December 7, 1979, the following exchange took place between Dr. John Dyer, Contracting Officer and Transit Product's President, Mr. Mize:

> Dr. Dyer: You said, in effect, that in the event there were problems with Intransco in terms of it being legitimately a minority business enterprise, you, one, would be willing to substitute and, two, you felt confident you could substitute.
>
> Mr. Mize: That's correct.

Plaintiff's Exhibit 11 at 8.

This contract award to Transit Products was under continual scrutiny during 1979 by the legislative and executive political branches of the local government--The Dade County Commisison and the administrative mass transit agency--as well as

the federal executive branch (The UMTA) and the federal judicial branch (United States District Court). Again, the position of H.K. PORTER has remained consistent since August 1979--adamantly insisting that no minority subcontractors existed, while Transit Products listed minority businesses in its bid proposal and indicated willingness to substitute another MBE, should Intransco be found not to be a legitimate minority business enterprise. Therefore, the decision to award Metrorail Contract Y-621 to Transit Products was valid, if the MBE provision was valid.

The final question is whether the MBE requirement itself was constitutional. UMTA Circular 1165.1, effective March 1, 1978 (more than one year before the contract in question) cited eight separate sources of authority for the MBE goal: (1) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 d-1; (2) Section 12(f) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1608(f); (3) 49 C.F.R. Part 21; (4) 28 C.F.R. Part 42, Subpart F; (5) Executive Order 11625 (October 13, 1971); (6) Department of Transportation Order 4000.7 "Minority Business Enterprise Program" (March 26, 1975); (7) Department of Transportation Order 1000.12 "Implementation of the Department of Transportation's Title VI Program" (January 19, 1977); and (8) Federal Management Circular 74-7 "Uniform Administration Requirements for Grants-in-Aid to State and Local Governments" (September 13, 1974). See Plaintiff's Exhibit 8 Urban Mass Transportation Administration Circular 1165.1 "MBE Policy and Requirements for Grant Recipients" at page 1-2. The Court will

now turn to the question of whether the 5% minority goal in Contract Y-621 was unconstitutional or otherwise illegal.

V. CONCLUSIONS OF LAW

The minority business enterprise goals at issue in this litigation were mandated by the federal government as a condition of its participating in financing 80% of Metrorail's construction costs. The Urban Mass Transportation Act, 49 U.S.C. App. §§1601-1618 refers to Title VI of the 1964 Civil Rights Act[6] in prohibiting discrimination "under any project, program or activity funded in whole or part through financial assistance" under the Urban Mass Transportation Act. 49 U.S.C. App. §1615(a)(1). Metrorail was such a project funded by the federal government under the Urban Mass Transportation Act. The Congress gave the Secretary of Transportation the responsibility to take affirmative action to assure compliance with subsection (a)(1) of the Act. 49 U.S.C. §1615(a)(2)("The Secretary shall take affirmative action to ensure compliance"). Pursuant to the federal requirements, DADE COUNTY's bid invitation for the Metrorail contract at issue included Addendum 3 (the 5% minority business enterprise goal) in response to the Secretary of Transportation's Order 4007.7A and the Urban Mass Transportation Administration's Circular 1165.1. The Court declines to find the provisions in the Act unconstitutional, nor does the Court find the Secretary's order unconstitutional, or DADE COUNTY's contract addendum facially unconstitutional. In light of Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level, Congress

had the power to remedy the effects of past discrimination. DADE COUNTY's modest 5% minority business enterprise goal--not quota--for the Metrorail contract was a valid implementation of Congressional policy.

In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Supreme Court upheld a minority business enterprise provision of the Public Works Employment Act of 1977, 42 U.S.C. §§6701-6736, which required at least 10% of any local public works project to be set aside for minority business enterprises. As Defendants correctly note, the 5% minority business enterprise goal provision at issue in this case is less burdensome than the 10% minority business enterprise quota upheld against constitutional challenge in Fullilove. Further, the minority business enterprise goal is not a strict quota of the sort found violative of Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Constitution by the Supreme Court in Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

The Metrorail contract allowed for a waiver of the 5% minority business enterprise goal, a provision that amounted to an escape mechanism by which H.K. PORTER could justify its inability to meet the 5% goal. At the hearing conducted by JOHN A. DYER, the transportation authority concluded that Plaintiff was not in compliance with the bid invitation's minority contractor participation provisions. H.K. PORTER failed to contact a single minority business in the course of preparing its bid, seeking to justify its inaction by asserting that there were no minority businesses in existence which could perform any

portion of the contract work. H.K. PORTER's bid was rejected, and upon administrative review by the Department of Transportation's Urban Mass Transportaton Administration, Carl B. Richardson, Acting Director, wrote a letter dated December 17, 1979 to Defendant DYER concurring in the award of the Metrorail contract to the second lowest bidder, Transit Products, Inc. See Defendants' Composite Exhibit 2.

The Court has reviewed the transcript of the hearing and concludes, as did Judge Kehoe nearly six years ago, that the hearing complied with constitutional due process requirements. H.K. PORTER presented its claim that one of the two proposed minority contractors in Transit Products' bid (Intransco) was not a true minortiy contractor, yet could not explain away its own total non-compliance.[7]

Defendant DYER's refusal to waive the 5% minority business enterprise goal is justified on these facts, particularly in light of the second-lowest bidder's ability to find minority-owned subcontractors. DYER's actions did not violate Florida administrative law, due process, nor were they arbitrary or capricious. See South Florida Chapter of the Asssociated General Contractors of America, Inc. v. Metropolitan Dade County, 723 F.2d 846, 850 (11th Cir. 1984)[8] (Pendent Florida due process and equal protection claims judged constitutional claims because Florida Supreme Court has held tht Florida's due process and equal protection guarantees confer the same protection as their federal counterparts).

Therefore, H.K. PORTER was not entitled to receive the Metrorail contract in question, nor were Plaintiff's legal rights violated by DADE COUNTY when the Defendant awarded the contract to another business. Defendants' motion for summary judgment is granted on the basis that Defendants are not liable to Plaintiff for any alleged damages resulting from the award of Contract Y-621.

DONE AND ORDERED in Chambers at Miami, Florida this 8th day of May, 1986.

Edward B. Davis
UNITED STATES DISTRICT JUDGE

cc: Charles C. Kline, esq.
Robert A. Cuevas, Jr.

FOOTNOTES

[1] Addendum 3 provides in pertinent part that a bidder was required to either:

> (a) involve minority business enterprises (MBE's) in five percent of the contract work; or
>
> (b) demonstrate that:
>
> > "1. it has made every reasonable effort to contact and negotiate with Minority Contractors in an attempt to subcontract work, including every reasonable effort to select the portions of the work proposed to be subcontracted, in order to achieve the stated goal;
> >
> > 2. it was unable, notwithstanding such efforts, to achieve the stated goal because Minority Contractors were not qualified or were Unavailable; and . . .". (Section IIIC of Appendix B p. 4, Plaintiff's Exhibit 1F, admitted in evidence October 19, 1979).

MDC had promulagated this provision in response to DOT's Secretary Order 4000.7A and UMTA's Circular 1165.1 which sought to clarify DOT's MBE's policy and requirements for UMTA grant recipients. An MBE was defined as:

> a business enterprise that is owned and controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background, or other similar cause. Such persons would include, but not be limited to, Blacks (not of Hispanic origin); Hispanics; Asians or Pacific-Islanders; American Indians or Alaskan Natives; and women, regardless of race or ethnicity.

(Footnote by Court of Appeals)

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[2] Porter Co.'s preliminary injunction motion was not ruled on by Judge King; however, Porter Co. was granted a summary judgment which provided essentially the same relief sought by the injunction. (Footnote by Court of Appeals)

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[3] He specifically found (1) Porter Co. failed to make every reasonable effort to contact and negotiate with MBE's other than

4. Percentage Goals for the Dollar Value of Work to be Awarded to MBEs

Adequate planning is critical to insuring that MBEs have an equitable opportunity to compete for contracts and subcontracts. The applicant should begin this planning by reviewing and evaluating its transportation improvement program to identify those procurement activities which have the greatest potential for MBE participation. Once these have been identified, goals should be set which are practical and related to the availability of minority firms in desired areas of expertise. Goals provide a benchmark for achievement of the MBE program within a specified time frame.

UMTA does not prescribe a methodology that must be followed in setting goals, thereby allowing for flexibility depending on local circumstances. There are several factors, however, which contribute to successful goal setting:

-- Goals should be based on projections of contract awards.

-- Goals should reflect the full range of proposed procurement activity and should not be confined to only one area, such as construction.

-- Different goals should be set by the type of proposed procurement, e.g., one goal for architecture and engineering, another for construction, and another for supplies and services.

-- Achievement of specified MBE subcontract goals or adequate documentation and justification of failure to meet the goals must be required of prime contractors.

-- Goals should be related to the availability of MBEs.

-- Other local MBE goals should be taken into consideration.

The setting of goals is an attempt to match projected procurements with available, qualified MBEs. An MBE is unavailable to perform if it has the knowledge of the terms and specifications of the contract needed to formulate intelligently a proposal for such work or to decline intelligently an opportunity to formulate such a proposal and it does not intend, or is unable, to make a proposal because of lack of interest, inability to meet the reasonable and ordinary demands connected with doing such work, unwillingness to meet the specifications for such work, unwillingness to work on this project or in this geographic area, or such other reason as is determined by the applicant to be sufficient.

The geographic basis for assessing MBE availability will vary with the type of procurement. For example, availability for printers may be confined to the local metropolitan area due to logistics of timely completion of work orders. On the other hand, the availability of A&E firms might be determined on a national basis, since these firms are more mobile. In general, in

defining the geographical boundaries for determining the availability of MBEs in specific trades or professions, the applicant should follow a common sense approach and the customs that the applicant have applied to non-minority firms.

It should be kept in mind that, if the data collected to develop goals, particularly MBE-availability, is inadequate or is assessed in a superficial manner, UMTA may find the goals unacceptable.

Goals should be reviewed at least annually. The review process should analyze the projected versus the actual MBE participation during the previous year. The necessary revisions should be made based on the analysis and submitted to UMTA. Goals, and a description of the methodology used in establishing them, must be submitted to UMTA with each project application.